The Indian Journal for Research in Law and Management

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Editor-in-Chief – Prof. (Dr.) Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

THE EFFECTIVENESS OF NEW SEBI

ABSTRACT

The research study examines "***The Effectiveness of New SEBI" The*** main changes introduced by the recently notified SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021 are examined in this paper along with their significance from the point of view of the companies and the employees who get the benefits. This research paper includes Flexibility in the plan's implementation strategy, Modifications to the plan's execution path. The paper also highlights on Removal of the word "permanent" from the employee definition, Employees of "group" and "associate" companies are included, Position in relation to privately held corporations

This research paper will address the recently announced changes to the SEBI guidelines.

Keywords :- Securities and Exchange Board of India, 2021

INTRODUCTION

Shares that a corporation awards to its employees in exchange for their important labour on behalf of the company are known as sweat equity shares. It's a benefit or incentive that employers provide to staff members to keep them inspired. Sweat equity shares are defined as shares that a firm issues to its directors or workers at a discount or for a consideration other than cash under section 2(88) of the Companies Act, 2013[1]. Section 54 of the Companies Act, 2013

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[1] Indian Code, (https://www.indiacode.nic.in/handle/123456789/2114?sam_handle=123456789/1362)

and the Companies (Share Capital and Debentures) Rules, 2014[2] govern sweat equity shares issued by unlisted companies in India. Prior to August 2021, the listed firms were subject to distinct regulations for share-based employee benefits and the issue of sweat equity. These regulations were known as the SEBI (Share Based Employee Benefits) Regulations, 2014[3] and the SEBI (Issue of Sweat Equity) Regulations, 2002[4](henceforth referred to as the preceding rules). The previous two regulations were combined into a single new regulation, the SEBI (Share Based Employee Benefits & Sweat Equity) Regulation, 2021, which was released by the Securities Exchange Board of India (SEBI)[5] on August 13, 2021.

This article attempts to analyze how the new legislation has been updated to facilitate compliance and account for shifting business circumstances by comparing it to the prior regulations.

Only permanent employees were allowed to get sweat equity shares and receive share-based perks such stock appreciation rights (SARs) and employee stock option plans (ESOPs) under the former regulations. However, the New Regulations allow both permanent and non-permanent employees to receive these benefits and/or issue these shares. Listed companies now have more flexibility according to the New Regulations, since they can pay and/or offer incentives to non-permanent employees who were not previously eligible for sweat equity shares and share-based perks.

Furthermore, as made clear by the New Regulations, individuals who work solely for listed businesses or their group companies may now get share-based incentives from them. Employment that was "exclusive" was not necessary in the past. This led to some uncertainty regarding whether listed corporations could offer share-based incentives to workers who are employed on a non-exclusive basis.

However, the New Regulations continue to refer to "employees" of group companies and listed firms rather than "exclusive employees" with relation to sweat equity shares. Consequently, it seems that listed firms may, on a non-exclusive basis, issue sweat equity shares to employees of themselves and/or their group companies in the absence of a clarification from SEBI.

[2] Companies (Shares capital and debentures) Rule, 2014 (India)
[3] SEBI (Share Based Employee Benefits) Regulations, 2014 (India)
[4] SEBI (Issue of Sweat Equity) Regulations, 2002 , (India)
[5] Securities and exchange board of India(share based employee benefits and sweat equity) Regulations, 2021.

Expanded definition of an “employee”

The definition of "employee" has changed significantly as a result of the new regulation. Regulation 2(i) of the new regulation states that, in contrast to the previous regulation, permanent employees are not included in the definition of employee. It only consists of the company's directors and personnel as designated by the business, both inside and outside of India. Unlike the previous rule, it expressly includes non-executive directors in the definition of workers.
The listed firms may offer share-based benefits to its employees, as well as to any employee of a group company, its subsidiary or associate company, or any employee of the holding company, in accordance with the revised definition of employee. Moreover, the benefits are also available to employees who are covered by joint ventures. The argument for incorporating joint venture personnel stems from the definition of "associate" in Section-2(6) of the Companies Act, 2013, which include joint ventures.

Additionally, the sweat equity regulations have been included to chapter IV of the new regulations, and regulation 29 defines employees for the purposes of the chapter. Unlike the earlier sweat equity rule, this definition expands the concept of employment by leaving out the permanent employee. Furthermore, independent directors are eligible to get sweat equity incentives because they are not specifically forbidden from obtaining them, in contrast to share-based rewards.

The removal of the term "permanent employee" from the definition of employee has also made it possible for businesses to offer their contract workers, gig workers, freelancers, and other workers share-based perks and sweat equity.

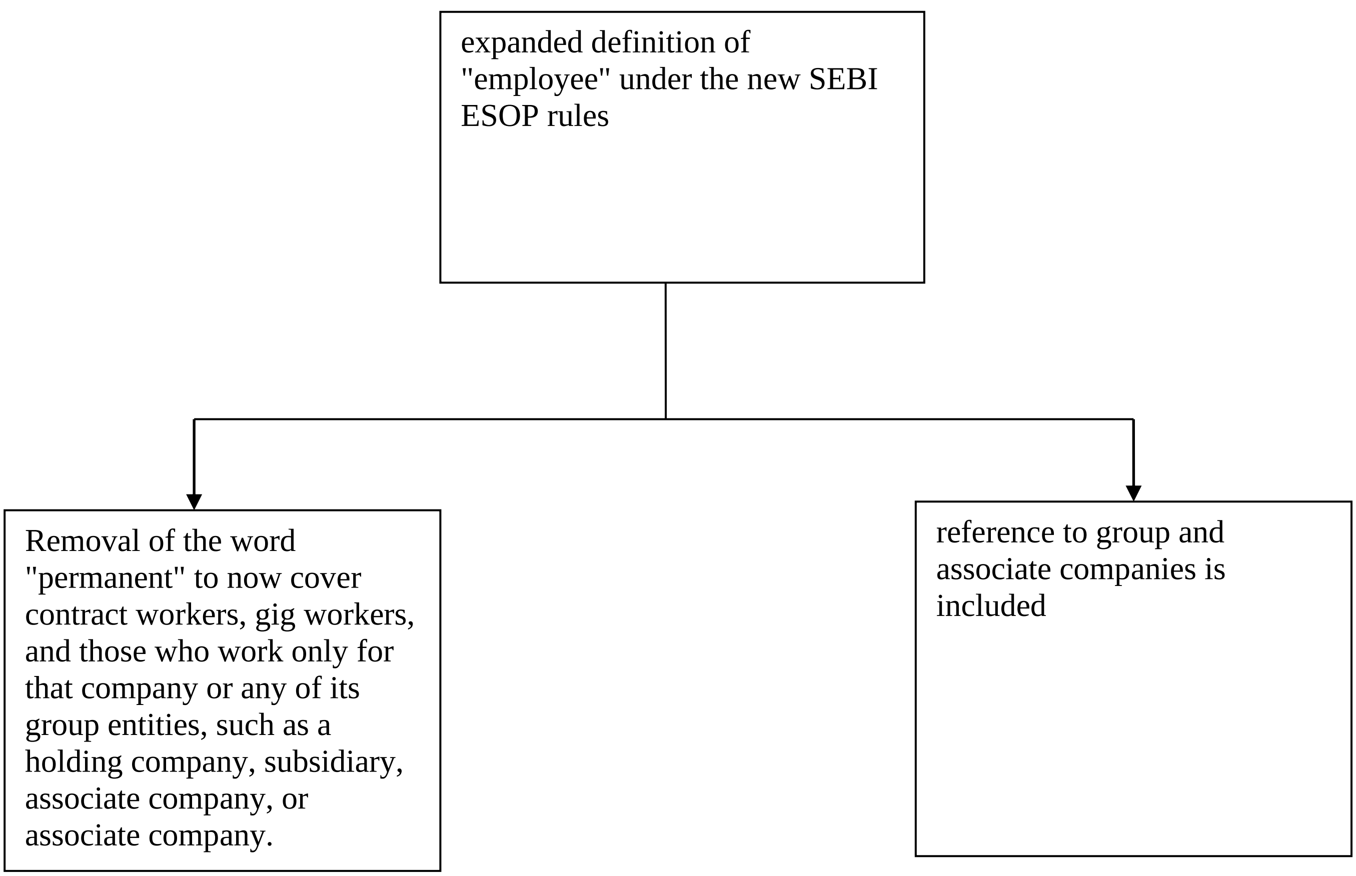
Flexibility in the plan's implementation strategy

The New Regulations, like the Former SEBI Regulations, allow share-based benefit plans to be implemented either directly or through an irreversible trust. The New Regulations also allow listed companies to alter the plan's implementation method if necessary, as long as they meet two requirements: (i) they get the shareholders' prior consent through a special resolution; and (ii) the change won't negatively impact employee interests.

Modifications to the plan's execution path

Regarding the scheme's execution, the rule has undergone another noteworthy modification. The company may choose to execute the scheme directly through the company instead of through a trust, or vice versa, in accordance with law 3 (1) of the new law. Should the company decide to alter its course during implementation, and provided that the current situation justifies it, it must obtain new and prior shareholder approval through a special resolution. The interests of the shareholders shall not be adversely affected by such a diversion.

Under the former regulation, companies were not allowed to alter the implementation path prior to the scheme's execution. The new regulation allows the business to assess the existing circumstances and determine the most effective course of action for implementing the plan.



Removal of the word "permanent" from the employee definition

Before the word "permanent" was removed, it was unclear if contract workers and other non-permanent employees might be regarded as employees for the purposes of the Share Based Benefits Scheme and be entitled for benefits. An employee could only be a "permanent" employee under the previous SEBI regulations, which prohibited non-permanent employees from taking part in share-based benefit schemes.

Nonetheless, businesses all around the world have begun hiring temporary workers and creating flexible work schedules. Even while the idea of gig workers—which includes direct contractors—has been there for a while in India, the gig economy is expanding quickly as a result of the epidemic and an increase in government initiatives like Start-up India and Skill India. According to the Economic Survey 2020–21[6], India has become one of the global leaders in the flexi staffing sector, with one of the largest gig economies.
Furthermore, as per a report titled "The Rising of Gig Economy in India" (2021) by Primus Partners and the Associate Chamber of Commerce and Industry of India (ASSOCHAM Report)[7], there has been a surge in the utilization of the gig economy concept in diverse sectors, typically in creative fields like content creation and social media. Approximately 15 million gig workers are employed in various fields like information technology, human resources, designing, etc., and 36% of American workers are part of this gig economy.

[6] Economic Survey 2020-2021, India's Gig Economy now among largest in the world, Economic Times, January 29, 2021 (https://economictimes.indiatimes.com/tech/technology/economic-survey-2020-21-indias-gig-economy-now-among-largest-in-the-world/articleshow/80586505.cms)

[7] Associate Chamber of commerce and Industry of India ad Primus Partners Report ,(2021) (https://www.primuspartners.in/wp-content/uploads/2021/02/Gig-Economy-Report.pdf)

Furthermore, the BCG Report[8] states that over the next two to three years, the gig economy may generate about one million net new jobs due to the immense potential and necessity for gig-based work.

Therefore, the expert group recommended that the term "permanent" be deleted in place of adding each category of employee that could be covered within the definition of employee in order to accommodate changing work arrangements following the pandemic and to give companies the flexibility to determine which employees they would like to cover under the Share Based Benefit Schemes.

The New SEBI ESOP Regulations now permit non-permanent employees, such as contractual employees, gig workers, etc., who work exclusively for the company (or exclusively for a group company of such company), to receive share-based employee benefits based on the expert group's recommendation. According to the SEBI FAQs, share-based benefit schemes are available to workers who work "exclusively" for the company, regardless of whether they are working in India or abroad. Furthermore, it has been made clear by the SEBI FAQs[9] that the New SEBI ESOP Regulations would also apply to contractual employees.

Employees of "group" and "associate" companies are included

Only workers of the company implementing the share-based benefit scheme, as well as workers of the holding and subsidiary companies, were eligible to receive benefits under the share-based benefit scheme under the previous SEBI regulations.

But the New SEBI ESOP Regulations have broadened the definition of "employee," so now listed companies can offer Share Based Benefit Schemes to workers who exclusively work for a listed company or any of its "group" companies, such as a holding company, subsidiary, or

[8] BCG Report unlocking the potential of the Gig Economy in India. (https://media-publications.bcg.com/India-Gig-Economy-Report.pdf)

[9] SEBI FAQ No.5

associate company. Regarding employees, the New SEBI ESOP Regulations make particular mention of "group company" and "associate company" employees.

Associate company: The term "associate" was used in the previous SBEB regulations. To align the definition of employee with the 2015 amendment to the Companies (Share Capital and Debentures) Rules, 2014 ("Rules"), which prohibited associate company employees from getting shared-based benefits, the reference to associate company was removed. Employees of a listed business's "associate" company are now qualified to earn share-based employee benefits under the New SEBI ESOP Regulations. The SEBI FAQs further make clear that, subject to shareholder approval, employees of joint ventures are likewise qualified to receive benefits under the Share Based Benefit Schemes.

Group company: Under the New SEBI ESOP Regulations, the term "group" is used for the first time to refer to two or more companies that are, directly or indirectly, able to:

(i) utilize at least 26% of the other company's voting rights;

(ii) designate more than half of the other company's board of directors members; or

(iii) exercise authority over the other company's administration or operations.

The term "group" has been added, enabling group companies to create Share Based Benefit Plans that are common to all members of the group. Furthermore, employees who work exclusively for a group company of the listed firm will be included in the definition of "exclusively working" for a company.

For example, in accordance with the New SEBI ESOP Regulations' definition of "group," Company X may now offer Share Based Employee Benefits to the staff of Company A and

Company B, even though they are not affiliated, if two companies (Company A and Company B) jointly own 26% of the share capital of a listed company (Company X). Moreover, employees of Company X may be eligible for Share Based Benefit Plans offered by both Company A and Company B. However, because their employees are not in the same group, Company A and Company B are unable to provide each other such perks.

As a result of this adjustment, businesses can now provide Share Based Benefit Plans to a wider range of workers.

Thus, it has become simpler for a large number of large Indian conglomerates to extend Share Based Benefit Schemes across the group, which previously did not satisfy the holding company or subsidiary company requirements due to complex holding structures, by expanding the scope of employees to include "group" companies.

Position in relation to privately held corporations

Only listed businesses are subject to the New SEBI ESOP Regulations; unlisted businesses are still governed by Section 62(1)(b) of the Companies Act, 2013 in conjunction with Rule 12 of the Rules, which only applies to permanent employees and excludes those employed by associate or group companies. Consequently, the term given by the Companies Act, 2013 is more limited than the definition given by the New SEBI ESOP Regulations.

The Ministry of Corporate Affairs was referred to in this regard during the SEBI meeting on the "Proposed New SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021," with the intention of aligning the definition of employee with the New SEBI ESOP Regulations[10]. The term as stated in the Rules, however, has not been changed and is still more restrictive than the New SEBI ESOP Regulations.

[10] Proposed new SEBI (Share Base Employee Benefit and Sweat Equity) Regulations, 2021 (https://www.sebi.gov.in/sebi_data/meetingfiles/sep-2021/1631782594051_1.pdf)

Thus, it becomes crucial for unlisted businesses planning to launch an IPO to carefully consider the terms of their share-based employee benefit plans and make sure that their definition of employee aligns with the New SEBI ESOP Regulations. This is especially important when it comes to filing the draft red herring prospectus, which requires adherence to both the Companies Act, 2013, and the New SEBI ESOP Regulations.

CONCLUSION

Share-based employee benefit plans have long been a tried-and-true strategy for motivating staff members and keeping qualified individuals on board. Companies now have to make sure that employee rewards are in line with their long-term goals because classic conceptions are changing. The main goal of the New SEBI ESOP Regulations is to make them more employee-friendly and give businesses the freedom to create plans that better suit their requirements.

Companies now have more freedom to offer Share Based Benefit Plans to non-permanent employees who work solely for them because the term "permanent" has been removed from the definition of employee. This is a significant shift since it reflects the growing tendency of businesses hiring contract workers and other non-permanent staff. Furthermore, by including the terms "group" and "associate," it guarantees that Share Based Employee Benefit Schemes are accessible to a wider range of workers and facilitate group corporations.